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Criminal Law -- Double Jeopardy

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future well-being of the entire race.¹⁷ In an important Washington case, which shows the attitude adopted by these tribunals, the court justified its decision by saying that the *Adkins* case is not conclusive as to the validity of a state law "enacted in the exercise of the police power of the state."¹⁸

It is not inconceivable that the Court could have found substantial difference in the District of Columbia statute and the New York wage law to justify a distinction between the two. Nor is it at all unlikely that the Court might have reached an opposite result had it considered the constitutional question involved from the broader aspects of present-day social policy. However, as a practical question, would it be advisable to regulate the wages of women workers when no such regulation is placed on men? If so, many industries might discharge their women employees and replace them with men willing to work for less than the state has set for women. Furthermore, a minimum wage might become a maximum wage. Lastly, was the Court, in passing on the validity of the New York Wage Law, defining a fundamental right of individuals to bargain for the amount of wages to be paid and received, subject to regulation by neither federal nor state government?

O. W. CLAYTON, JR.

Criminal Law—Double Jeopardy.

A and *B* while together, were held up and robbed by the defendants. *A* was killed. The defendants were tried and found innocent of the murder of *A*. Subsequently, they were indicted for robbery with firearms of *B* to which they pleaded not guilty and former jeopardy. The plea of former jeopardy was overruled; the North Carolina Supreme Court held the two crimes separate and distinct, as there was no identity of offenses.¹

It is a fundamental principle that a person cannot be tried twice for the same offense, and a plea of former acquittal or conviction will be sustained,² if the defendant could have been convicted under the first

¹⁷ *Holcombe v. Creamer*, 213 Mass. 99, 120 N. E. 354 (1918); *Williams v. Evans*, 139 Minn. 32, 165 N. W. 495 (1917); *Simpson v. O'Hara*, 70 Ore. 261, 141 Pac. 158 (1914); *Malette v. City of Spokane*, 77 Wash. 205, 137 Pac. 496 (1913); *Larsen v. Rice*, 100 Wash. 642, 171 Pac. 1037 (1918). *Contra*: *Topeka Laundry Co. v. Court of Industrial Relations*, 119 Kan. 12, 237 Pac. 1041 (1925); see *Stevenson v. St. Clair*, 161 Minn. 444, 201 N. W. 629 (1925) (statute constitutional as to minors).

¹⁸ *West Coast Hotel Co. v. Parrish*, 55 P. (2d) 1083, 1089 (Wash. 1936). Probable jurisdiction of the case is noted in 57 Sup. Ct. 40. If certiorari is granted, this case is expected to decide more definitely the constitutionality of minimum wage legislation, and clear up the doubts left by the principal case.

¹ *State v. Dills and Osborne*, 210 N. C. 178, 185 S. E. 677 (1936).

² See *State v. Mansfield*, 207 N. C. 233, 236, 176 S. E. 761, 762 (1934); N. C. CONST., art. 1, §17; U. S. CONST., AMEND. V.

indictment.³ The determination of whether one is being tried twice for the "same offense" is accompanied with no little difficulty.

Where crimes against two persons grow out of one act it has been consistently held that a prosecution and conviction, or acquittal, as to one of the victims is no bar to a prosecution as to the other victim.⁴ "To support a plea of former acquittal it is not sufficient that the two prosecutions should grow out of the same transaction; but they must be for the same offense, in both fact and law."⁵ The test applied in *Rex. v. Vandercomb*⁶ and introduced into the law of this state⁷ is: "Could the defendant have been convicted on the first indictment upon proof of the facts, not as brought forward in evidence, but as alleged in the record of the second."⁸ If this be answered in the affirmative the defendant is being tried twice for the same offense.

In the principal case the first indictment was for the murder of A. The defendants could not possibly be convicted under that indictment upon proof of robbery with firearms of B. Accordingly, the offenses are separate and distinct.

A single act may be an offense against the statutes of two governments⁹ and if either statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution under the other. In such a case the offenses are not the same in law and in fact.¹⁰ Here again, the victims are different personalities, and for that reason the offense against each is separate and distinct.¹¹

³ *State v. Birmingham*, 44 N. C. 120 (1852); *State v. Gibson*, 170 N. C. 697, 86 S. E. 774 (1915).

⁴ *State v. Yancy*, 4 N. C. 133 (1814) (contempt of court-assault and battery); *State v. Nash*, 86 N. C. 650 (1881) (shooting); *State v. Bynum*, 117 N. C. 752, 23 S. E. 219 (1895) (larceny).

⁵ *State v. Nash*, 86 N. C. 650, 651 (1881).

⁶ 2 Leach C. C. 708 (1796) (The defendant was acquitted of breaking and entering a dwelling and stealing. He was subsequently tried for breaking and entering with intent to steal.).

⁷ *State v. Nash*, 86 N. C. 650 (1881).

⁸ *State v. Nash*, 86 N. C. 650, 656 (1881). Ashe, J., dissenting: "In many cases it would be impossible to ascertain, except by the evidence, whether the offenses are the same, when there are different indictments for offenses that are of the same grade and character." *State v. Hankins*, 136 N. C. 621, 623, 48 S. E. 593, 594 (1904). "But this would not remove the fault unless the rule is further extended so as in terms to include the right of the defendant to prove the identity of the offenses charged in the two indictments, which might otherwise appear to be different."

⁹ *State v. Taylor*, 133 N. C. 755, 46 S. E. 5 (1903) (disturbing the peace-assault and battery); *State v. Stevens*, 114 N. C. 873, 19 S. E. 861 (1894) (failure to procure state and municipal whiskey license); *State v. Reid*, 115 N. C. 741, 20 S. E. 468 (1894); *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905); *State v. Harrison*, 184 N. C. 762, 114 S. E. 830 (1922) (violation of state and federal prohibition law).

¹⁰ *State v. Taylor*, 133 N. C. 755, 46 S. E. 5 (1903).

¹¹ See *State v. Stevens*, 114 N. C. 873, 877, 19 S. E. 861, 862 (1894) (where a

Where the second indictment is for a crime greater in degree than the first, and where both indictments arise out of the same act, it is held that an acquittal or conviction for the first is a bar to a prosecution for the second.¹² If there could be a prosecution for the greater offense the defendant would be tried twice for the lesser crime,¹³ as he could be convicted of the lesser crime when tried for the greater one.¹⁴ If "the same offense" means literally the same offense, it would seem that the defendant is not being tried twice for the same crime, but only twice for the same act. The state, however, should not be allowed to divide an offense consisting of several trespasses into as many indictments as there are acts of trespass that would separately support an indictment, and afterwards indict for the offense compounded of them all. An exception to the rule is made when the first indictment is procured by the collusion of the defendant.¹⁵ A conviction thereon is no bar to a subsequent indictment regularly brought. Under the first indictment the defendant is not in jeopardy for he is holding his fate in his own hand.

Where the second indictment is for a crime less in degree than the first, and where both indictments arise out of the same act, and the defendant could have been convicted under the first indictment of the lesser crime, the plea of former acquittal or conviction has been uniformly upheld.¹⁶ In this situation the defendant could not be convicted

license is required by the state and another by the town, selling the same glass of liquor may be a violation of the town ordinance and also a violation of the state law, if license has not been obtained from both; and further, the same act may be punishable by the federal government if in violation of its statute, and if the purchaser is a minor the same single act may constitute a fourth distinct offense of selling spiritous liquor to a minor—and even a fifth if the sale is on Sunday).

¹² *State v. Ingles*, 3 N. C. 4 (1797) (assault and battery-riot, beating, imprisoning); *State v. Lewis*, 9 N. C. 98 (1821) (larceny-robbery); *State v. Albertson*, 113 N. C. 633, 18 S. E. 321 (1893) (assault-affray); *State v. Bell*, 205 N. C. 225, 171 S. E. 50 (1933) (burglary-murder); *State v. Clemmons*, 207 N. C. 276, 176 S. E. 760 (1934) (arson-murder).

¹³ *State v. Lewis*, 9 N. C. 98 (1821).

¹⁴ N. C. CODE ANN. (Michie, 1935) §§4639, 4640.

¹⁵ *State v. Moore*, 136 N. C. 581, 48 S. E. 573 (1904) (indictment for simple assault procured at the solicitation of the defendant was held no bar to subsequent prosecution for assault with a deadly weapon regularly brought); cf. *State v. Cale*, 150 N. C. 805, 63 S. E. 958 (1909).

¹⁶ *State v. Stanly*, 49 N. C. 290 (1857) (affray-assault and battery. Associate Justice Battle, alone, intimated that in the case of a former conviction a different result should be reached from the case of a former acquittal. He stated that the test laid down in *Rex v. Vandercomb* applied only when there was a former acquittal of the greater crime and that there must be an exception in favor of a former conviction.); *State v. Lindsay*, 61 N. C. 468 (1867) (riot-intent to rape. It is specifically pointed out at page 102 that the defendant could not be convicted of assault with intent to commit rape upon an indictment for rape. Subsequent to this case N. C. CODE ANN. (Michie, 1935) §4639 was passed by the legislature, providing for conviction of assault upon an indictment for

under the first indictment upon the facts alleged in the second, but he could be convicted of the lesser crime upon the first indictment as the greater crime includes the smaller.¹⁷ If the acts alleged in the second indictment are used against the defendant in the first, it is manifest that there is double jeopardy.¹⁸

Where there are two transactions and two separate crimes arise,¹⁹ or where there is a repetition of the same crime,²⁰ a prosecution for one offense is clearly no bar to the other. If there is only one transaction and separate and distinct statutes are violated, the same result is reached.²¹

Where there is a failure to perform a legal duty, that omission of duty cannot be divided into separate offenses, because one prosecution will be a bar to subsequent proceedings.²²

The principal case is consistent with those cases holding that crimes arising out of one transaction and invading the rights of two persons are separate and distinct offenses. Plainly, the defendant is not being put in double jeopardy when prosecuted separately for the offense against each victim. Just as the victims are different, the offenses are different.

C. C. BENNETT.

Criminal Law—Solicitation.

The defendant told a fifteen-year-old boy that if he would set fire to a certain dwelling he would reward him with a pistol and furnish him with the necessary matches and oil. The boy assented to the plan but upon leaving the defendant, disclosed it to the officers. The North

rape. It is believed this statute would alter the result reached in this case, making it consistent with the other cases).

¹⁷ N. C. CODE ANN. (Michie, 1935) §§4639, 4640.

¹⁸ *State v. Lindsay*, 61 N. C. 468 (1867); *State v. Lawson and Cheatham*, 123 N. C. 740, 31 S. E. 667 (1898); *State v. Freeman*, 162 N. C. 594, 77 S. E. 780, (1913); *Cf. State v. Hankins*, 136 N. C. 621, 48 S. E. 593 (1904).

¹⁹ *State v. Robinson*, 116 N. C. 1047, 21 S. E. 701 (1895) (concealed weapon-assault and battery); *State v. Hooker*, 145 N. C. 581, 59 S. E. 866 (1907) (stealing-breaking and entering); *State v. Mansfield*, 207 N. C. 233, 176 S. E. 761 (1934) (bastardy-abandonment).

²⁰ *State v. Williams*, 94 N. C. 891 (1886) (selling liquor to different persons); *State v. White*, 146 N. C. 608, 60 S. E. 505 (1908) (carrying concealed weapon on different occasions); *State v. Jones*, 201 N. C. 424, 160 S. E. 468 (1931) (abandonment of children).

²¹ *State v. Pierce*, 208 N. C. 47, 179 S. E. 8 (1935) (burning barn-burning personal property in barn).

²² *State v. Roberson*, 136 N. C. 591, 48 S. E. 596 (1904) (prosecution for failure to get an annual license bars a further prosecution within the year); *State v. Commissioners of Fayetteville*, 6 N. C. 371 (1818) (prosecution for failure to keep one street in repair bars a further prosecution as to other streets in disrepair at the same time); *cf. State v. Jones*, 201 N. C. 424, 160 S. E. 468 (1931) (failure to support children is continuing offense and prosecution therefore is not barred by conviction for prior time).